

**Pace University**  
**DigitalCommons@Pace**

---

Pace Law Faculty Publications

School of Law

---

7-23-1997

# RFRA Is Not Needed: New York Land Use Regulations Accommodate Religious Use

John R. Nolon

*Elisabeth Haub School of Law at Pace University, [jnolon@law.pace.edu](mailto:jnolon@law.pace.edu)*

Follow this and additional works at: <http://digitalcommons.pace.edu/lawfaculty>



Part of the [Land Use Law Commons](#)

---

## Recommended Citation

John R. Nolon & Helen Maher, RFRA Is Not Needed: New York Land Use Regulations Accommodate Religious Use, N.Y. L.J., July 23, 1997, at 5, <http://digitalcommons.pace.edu/lawfaculty/730/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [cpittson@law.pace.edu](mailto:cpittson@law.pace.edu).

# **RFRA Is Not Needed: New York Land Use Regulations Accommodate Religious Use**

Written for Publication in the New York Law Journal  
July 23, 1997

John R. Nolon and Helen Maher

(Mr. Nolon is Charles A. Frueauff Research Professor of Law at Pace University School of Law; Ms. Maher is Editor-in-Chief of the Pace Environmental Law Review.)

**Abstract:** The case of *City of Boerne v. Flores* marked an important day in the history of the Constitution. The decision of the United States Supreme Court invalidated the Religious Freedom Restoration Act as applied to a local Texas zoning ordinance. The ordinance created a historical preservation area in an attempt to curb a church from expanding its buildings. The Supreme Court held that the Freedom Restoration Act went beyond Congress's power because of the Act's broad coverage and potential to intrude on laws regardless of context. This holding parallels the general application of the New York case law, which, generally allows religious organizations great freedom to expand their land use because these organizations generally promote public health, safety, morals, and welfare in their surrounding communities.

\*\*\*

## **Introduction:**

By invalidating the far-reaching Religious Freedom Restoration Act (RFRA) (42 U.S.C.A. § 2000bb (1993)) in *City of Boerne v. Flores* (1997 WL 345322 (U.S. June 25, 1997)), the United States Supreme Court reaffirmed the separation of powers doctrine and the role of Congress in the federal system, tipping the balance of power toward the states and the judiciary. The high court struck down the sweeping, popularly supported RFRA statute as an attempt by Congress to interpret the substantive rights protected by the Constitution and to decide cases and controversies. The court affirmed that the judiciary is the illuminator of constitutionally protected rights and that the states should be unencumbered by far-reaching limitations on their authority, particularly in the absence of clear evidence that they have threatened constitutional guarantees. RFRA was found by the Court to be "a considerable congressional intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 15.

## **Background of the Case**

The controversy in *City of Boerne v. Flores* arose from the application of a zoning ordinance in Boerne, Texas to the plans of a Catholic church to expand the size of its building to accommodate its growing membership. Before the necessary building permit could be obtained, the city established an historic district that included the church property. The ordinance required city approval of any construction affecting historic buildings within the district. City officials then rejected the archbishop's building permit request because the plans involved the destruction

of all but the façade of the church building which exemplifies mission revival architecture emblematic of the original Spanish missions in South Texas. The archbishop claimed that the ordinance violated RFRA, since the existing building was not large enough to serve all of its parishioners: a matter involving the free exercise of their religion. RFRA prevented federal, state and local governments from substantially burdening the exercise of religion even if the burden resulted from a rule of general application. The act applied a strict scrutiny test to all laws burdening religious practice and required the government to demonstrate that the application of its burden is in furtherance of a compelling governmental interest and is the least restrictive measure of furthering that interest. *See* 42 USCA § 2000bb-1. The district court held that Congress exceeded its authority by enacting RFRA, but the Fifth Circuit reversed, holding that RFRA was constitutional and applicable to local ordinances that protect historic districts and landmarks.

### **The Holding**

In *City of Boerne v. Flores* (1997 WL 345322 (U.S. June 25, 1997)), Justice Kennedy writing for a 6-3 majority, labeled RFRA's strict scrutiny language "the most demanding test known to constitutional law," which in this context reflects "a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at \*15. Congressional hearings attending the adoption of RFRA had not revealed recent evidence of laws targeting religious practice or motivated by discriminatory intent. Kennedy noted that, as distinguished from other statutes designed by Congress to remedy or prevent violations of constitutional rights, RFRA's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* at 14. In this context, the Court found that the legislation was not a proper exercise of Congress' power to remedy or prevent the infringement of constitutionally protected rights. "RFRA," Kennedy wrote, "was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control." *Id.* at 16.

### **Background of RFRA**

Prior to 1990, the Supreme Court subjected laws burdening the exercise of religion to a compelling state interest test. (*Sherbert v. Verner*, 374 U.S. 398, 406 (1963)). *Sherbert* held that courts must find that the burden imposed by the law is necessary to achieve a compelling state interest that justifies any substantial infringement of an individual's First Amendment rights. The *Sherbert* standard was changed in *Employment Division Services v. Smith* (494 U.S. 872 (1990)) which held that the government need not show a compelling basis for burdening a religious organization or person engaged in obeying religious dictates when it imposes a facially neutral requirement of general applicability. *Smith* allowed Oregon's drug laws to be enforced against members of the Native American Church who believed that peyote embodies their deity and that ingesting it was an act of worship and communion. The plaintiffs were discharged from their jobs as drug counselors at a rehabilitation clinic and denied unemployment compensation because of an Oregon statute that denied benefits to employees who had been discharged for work-related misconduct. In *Smith*, the Supreme Court adopted a new test regarding free exercise

claims, stating, “if prohibiting the exercise of religion is not the object of the [regulation] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” *Id.* at 882.

In cases that include religious freedom claims in addition to other constitutional claims, the Court concluded that the compelling state interest test would continue to be applied. *See id.* at 882-83. The *Smith* test was further refined in *Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah*, (508 U.S. 520 (1993)), in which the court stated that laws must be both neutral and generally applicable, and “a law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” 508 U.S. at 531-32.

### **Impact on Historic Preservation Ordinances**

Historic preservation and landmark preservation ordinances, of the type enacted in Boerne, Texas, can impose severe impacts on the owners of religious property. In the interest of preserving the historical integrity of buildings and districts, such ordinances can prevent the expansion of religious buildings to provide sufficient space for worship. Such ordinances can frustrate the sale of historic religious properties for the purpose of securing funds needed for religious purposes. The ordinances can even prevent the expression of religious beliefs by regulating the architecture employed in construction.

In New York, the conflict between historic preservation and landmark ordinances and the freedom to use religious properties thus far has been resolved in favor of local regulatory authority. For example, in *Society for Ethical Culture v. Spatt* (416 N.Y.S.2d 246 (1<sup>st</sup> Dep’t 1979), *aff’d* 415 N.E.2d 922 (N.Y. 1980)), the religious organization was prevented from demolishing a meeting house to build market-rate apartments to secure funding for its religious activities. The plaintiff claimed that the free exercise clause of the Constitution was violated by the ordinance. The court held that because of the secular nature of the proposed use of the property, no First Amendment violation had occurred. Similarly, in *Rector, Wardens, and Members of the Vestry of St. Bartholomew’s Church v. City of New York* (914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)), the church alleged that the New York City Landmarks Preservation Law unconstitutionally burdened its right to free exercise of religion. The church planned to replace a community center building with a forty-seven story office tower but was denied a permit by the City of New York and the Landmarks Preservation Commission. The court upheld the landmarks law relying on *Smith*. It characterized the law as “facially neutral regulation of general applicability” holding that “no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice, or the church’s inability to carry out its religious mission in its existing facilities.” *Id.* at 354-55. The *St. Bartholomew* and *Spatt* holdings make it exceedingly unlikely that a facial challenge to the application of a historic or landmark preservation law will succeed.

In an instance such as the Boerne, Texas case, where the religious institution can show that the effect of the law is to render it unable to carry out its religious mission, an as applied challenge may still be attempted. Similarly, where the religious institution claims that

architectural expression of its beliefs is prevented, it is possible that an issue of freedom of expression may be added to an alleged violation of free expression; under *Smith* the court might continue to apply the compelling state interest test. Finally, where there is evidence that the law is applied in some specific or individualized way to religious properties, it may fail to qualify for the protective *Smith* test since it may not be neutral or of general applicability. Historic preservation and landmark laws that provide specific exemptions, requiring case-by-case reviews, may be particularly vulnerable to such an as applied claim. Even these as applied challenges, however, face the force of the broad language in *Smith* which appears to vitiate free exercise challenges to landmark laws or other “valid and neutral law[s] of general applicability” that avoid directly regulating “religious beliefs as such.” 494 U.S. at 877.

### **Impact on Land Use Practice in General**

Outside the limited arena of historic district and landmark preservation legislation, the courts in New York have greatly favored religious institutions in their battles with local land use authorities. Most of the New York decisions are based on the courts’ interpretation of the police power and do not involve free exercise issues of the type raised by the archbishop in *Boerne*. The thrust of New York case law is that religious uses of property advance the public welfare and, therefore, cannot be excluded or heavily burdened by local land use regulations. The authority of local governments to enact zoning and other land use regulations is granted to them by the state legislature to promote the public health, safety, morals and welfare. Presumptively, a local land use regulation that excludes or heavily burdens the religious use of property is *ultra vires* the authority of the local government. In *Cornell University v. Bagnardi*, (503 N.E.2d 509 (N.Y. 1986)), the court stated, “Because of the inherently beneficial nature of churches and schools to the public, we held that the total exclusion of such institutions from a residential district serves no end that is related to the morals, health, welfare and safety of the community.” *Id.* at 594.

Most local zoning ordinances provide for places of worship as a permitted use in zoning districts, including single family neighborhoods. For nearly fifty years, local governments have known that the exclusion of religious uses was beyond their authority. In *North Shore Unitarian Society v. Plandome*, (109 N.Y.S.2d 803 (1951)), the court wrote that to exclude religious uses “would not substantially promote the health, safety, morals or general welfare of the community.” *Id.* at 804. This practice is so uniform that the issue of exclusion of religious uses has never reached the Court of Appeals.

In *Jewish Reconstructionist Synagogue of the North Shore v. Incorporated Village of Roslyn Harbor* (342 N.E.2d 534 (N.Y. 1975)), the court held that where the benefits attributable to public worship conflict with the local interest in preventing detrimental impacts on the surrounding neighborhood, and where this conflict cannot be reconciled by imposing reasonable conditions on the religious land use, the interests of the neighborhood must yield to the interests of public worship. In *Holy Spirit Assoc. for the Unification of World Christianity v. Rosenfeld*, (458 N.Y.S.2d 920 (2d Dep’t 1983)), the court stated, “Generally, municipalities should make efforts to accommodate proposed religious uses, subject to conditions reasonably related to land use.” *Id.* at 922. This is so, held the court, “even when it would be inconvenient for the community.” *Id.* at 925. These rulings make it difficult for zoning boards to deny applications

for area variances or for planning boards to deny applications for special permits where religious uses of the land are proposed. In other contexts, such denials are afforded a presumption of validity and upheld if any reasonable interpretation of the facts on the record supports the denial. Where a religious use is proposed, more is needed to justify a denial. In *Harrison Orthodox Minyan, Inc. v. Harrison* (552 N.Y.S.2d 434 (2d Dep't 1990)), it was held that a religious institution's application for a special permit may not be denied unless it is shown affirmatively that the board attempted to accommodate the use.

The reach of these holdings extends to the protection of a wide variety of "accessory uses" in which churches and other religious institutions engage. "To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation...." *Community Synagogue v. Bates*, 136 N.E.2d 488, 493 (N.Y. 1956). New York case law has sustained many accessory uses to houses of worship such as day care centers, parish houses and rectories, social clubs, recreational facilities, soup kitchens, overnight shelters for the homeless and even a broadcast studio and religious correspondence school.

It is difficult to imagine how religious land uses could have been further protected by RFRA, beyond the area of historic district and landmark preservation. In the application of land use regulations generally, religious uses will not be prejudiced by the invalidation of RFRA.

## **Conclusion**

In *City of Boerne v. Flores*, the U.S. Supreme Court doubted that the legislative record created by Congress in adopting RFRA demonstrated that there was a need for such far-reaching legislation to remedy or prevent violations of the constitutional guarantee of the free exercise of religion. Certainly the judicial record in New York regarding land use regulations validates that concern. To date only the secular uses of religious property have been thwarted by the application of historic preservation laws. More importantly, in their review of the application of land use regulations generally, the New York courts have protected religious exercise effectively by holding consistently that the religious use of property, and a wide variety of accessory uses, are in the public interest and, absent clear evidence to the contrary, must be accommodated by land use regulations.